IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6896 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANSUKHBHAI B SHIYAL NAGARPALIKA SOCIETY

Versus

CHIEF OFFICER UNA NAGARPALIKA

Appearance:

1. Special Civil Application No. 6896 of 2004

MRS KRISHNA G RAWAL for Petitioner No. 1

MR MURALI N DEVNANI for Respondent No. 1

MR NAGESH SOOD, AGP for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE M.S.SHAH

Date of decision: 06/10/2004

ORAL JUDGEMENT

Rule. Mr Murali N Devnani, learned counsel for respondent No.1 and Mr Nagesh Sood, learned AGP for respondent Nos. 2 and 3 waive service of Rule.

2. In this petition under Article 226 of the Constitution, the petitioner has challenged the action of

the respondent authorities in deducting Rs.1,03,359/= from the petitioner's pensionary benefits and for a direction to the respondents to refund the said amount to the petitioner forthwith with interest and the petitioner has also prayed for directions to the respondent authorities to fix the petitioner's pension in the grade of Octroi Inspector instead of fixing it in the grade of Octroi Guard.

3. The petitioner was appointed as an Octroi Guard by respondent No.1-Una Nagarpalika way back on 1.6.1962. In the year 1973, the petitioner alongwith 12 other Octroi Guards filed a case before the Industrial Tribunal for claiming the pay-scale of Octroi Clerk which is the next higher post. While the case was registered as Reference IT No. 340 of 1984 before the Industrial Tribunal at Rajkot, during pendency of the reference, by order dated 4.10.1996 the petitioner was promoted as Octroi Inspector in the scale of Rs.1200-2040 which subsequently came to be revised to Rs.4000-6000. In view of the promotion, the petitioner agreed with other employees on 7.9.1998 not to claim arrears of difference of salary as Octroi Clerk for the past period for which the petitioner had raised an industrial dispute before the Industrial Tribunal. Three other Octroi Guards who are similarly situate as the petitioner were also promoted as Octroi Inspectors and, therefore, the names of the petitioner and three others by consent came to the deleted from the reference. It appears that out of the total 12 employees, 5 employees had retired during pendency of the reference. The petitioner alongwith the three other employees were promoted as Octroi Inspectors and, therefore, the remaining 4 employees were promoted as Octroi Clerks with effect from 1.5.1978 and their salary was fixed in the pay-scale of Octroi Clerks with effect from 1.5.1978, but they were paid arrears of difference of salary only from 1.1.1986 as they gave up their claim for arrears of difference of salary for the period from 1.5.1978 to 31.12.1985.

The petitioner accordingly continued to render services as Octroi Inspector till April, 2001. Upon abolition of octroi in May, 2001, by order dated 31.5.2001, the respondent-Municipality appointed the petitioner as supervisor in the transport section of the Municipality in the same pay-scale in which the petitioner was earlier rendering services as Octroi Inspector i.e. Rs.4000-6000. Subsequently, upon the petitioner's retirement on superannuation on 31.1.2003, when the petitioner's pension papers were being prepared, it appears that respondent No.2-Provident Fund & Pension

Commissioner, Gujarat State raised an objection about the legality of of the petitioner's promotion as Octroi Inspector by order dated 4.10.1996 on the ground that the petitioner was not qualified for promotion to the post of Octroi Inspector as per the promotion rules framed by the Development Commissioner for the employees in panchayat services. As per the said rules, for promotion to the post of Octroi Inspector, a person was required to possess the qualification of SCC and two years experience; for the post of Octroi Naka Clerk, a person was required to possess the qualification of SSC pass and five years experience in the administration of nagar panchayat, but for the post of octroi guard, the minimum qualification required was 6th std. pass and knowing bicycle riding. Since the petitioner possesses the qualification of only 9th std., the objection was raised about the legality of the petitioner's promotion as Octroi Inspector. On that basis, respondent Nos. 2 and 3 sought recovery of an amount of Rs.1,30,359/- being the differential amount between the salary of Octroi Inspector and Octroi Guard for the period from October 1996 till the petitioner's retirement in January, 2003. The petitioner's pension has also been fixed on the basis of the petitioner's pay as Octroi Guard. Hence, the present petition.

4. Mrs Krishna Raval, learned counsel for the petitioner has submitted that the petitioner had actually rendered services as an Octroi Inspector from October, 1996 to January, 2003 and, therefore, the respondents could not have recovered the differential amount between the salary of the Octroi Inspector and the Octroi Guard. Strong reliance has been placed on the decision of the Apex Court in PH Reddy vs. NTRD, 2002(2) SLR 694 and also on the decision of this Court in MM Patel vs. State of Gujarat, (2003) 1 GHJ 668. This submission is made on the basis that even if there was any mistake in promoting the petitioner to the post of Octroi Inspector, the petitioner was entitled to get salary of Octroi Inspector as the petitioner had actually rendered services for the entire relevant period from October 1996 onwards till April 2001 and from May 2001 till retirement on the equivalent post of supervisor.

The learned counsel for the petitioner has also challenged the decision of the respondent authorities in fixing the petitioner's pension on the basis of the petitioner's salary as Octroi Guard. It is submitted that it was in the year 1973 that the petitioner alongwith others had raised an industrial dispute before the Industrial Tribunal for getting the pay-scale of

Octroi Clerk and it was on account of the promotion granted to the petitioner in October, 1996, the petitioner had given up his claim for arrears of difference of salary. Otherwise, the petitioner would have pressed his claim for arrears of salary of an Octroi Clerk.

5. On the other hand, Mr Nagesh Sood, learned AGP for respondent Nos. 2 and 3 has opposed the petition and submitted that since the petitioner did not possess the requisite educational qualification as per the rules, the decision of the authorities is legal and proper on both the issues i.e. on the question of salary and fixation of pension.

6. Mr Devnani, learned counsel for respondent No.1-Municipality has submitted that the Municipality has acted in accordance with the orders of respondent Nos. 2 and 3 and that since the petitioner's promotion to the post of Octroi Inspector was not in accordance with the rules, appropriate orders may be passed.

7. Having heard the learned counsel for the parties, it appears to the Court that when the petitioner had actually rendered services to respondent No.1-Municipality as an Octroi Guard way back in the year 1962 and thereafter the Municipality had granted promotion to the petitioner to the post of Octroi Inspector after 34 years of service and the petitioner had rendered services on the post of Octroi Inspector and on an equivalent post from October 1996 till the date of retirement in January 2003, there is substance in the submission made by the learned counsel for the petitioner that even if there was a mistake on the part of the Municipality in granting the petitioner pay-scale of Octroi Inspector or in giving the petitioner promotion to the post of Octroi Inspector, the petitioner having actually rendered services as Octroi Inspector, the respondent authorities could not have effected recovery of the differential amount of salary for the aforesaid period from October 1996 to January 2003.

8. In PH Reddy vs. NTRD, 2002(2) SLR 694, the Apex Court has held that the employee who had been in receipt of a higher amount on account of erroneous fixation by the authority should not be asked to repay the excess pay drawn and the Apex Court accordingly set aside that part of the order of the authority by which the recovery was directed for the excess amount. Following the aforesaid decision and the principles to the that effect laid down in the decision dated 4.4.2001 of this Court in LPA No.

578 of 2000 in SCA No. 2196 of 1999, the recovery of Rs.1,03,359/- made by the respondents is hereby declared to be illegal and the respondents shall refund the same to the petitioner.

9. As far as the fixation of pension is concerned, the Court finds considerable substance in the submission made on behalf of the respondent authorities, particularly respondent Nos. 2 and 3, that since the petitioner did not possess the requisite educational qualification for promotion to the post of Octroi Inspector or even for promotion to the post of Octroi Clerk for which SSC was the minimum qualification, the petitioner's pay for the purposes of pensionary benefits could not have been fixed in the pay-scale for Octroi Inspector or Octroi Guard and, therefore, the respondent authorities are justified in fixing the petitioner's pay in the pay-scale of Octroi Guard which is Rs.2550-3200 as stated by the learned counsel for the petitioner.

10. In view of the above discussion, this petition is partly allowed. The action of the respondents for recovery of a sum of Rs.1,03,359/- is declared to be illegal and the respondents shall refund the said amount to the petitioner within one month from the date of receipt of the writ of this Court or a certified copy of this order, whichever is earlier. The amount shall be refunded with 9% interest from the date of recovery.

As far as the prayer challenging fixation of the petitioner's pension and other retiral benefits is concerned, the petitioner is not entitled to any relief and, therefore, that part of the petitioner's prayer is rejected.

Rule is made absolute only to the aforesaid extent.

(M.S. Shah, J.)
sundar/-